sentences under Clauses (1) and (2) of Article 42 of the Constitution shall act on the advice of the Pardons Board.

Raja Abdul Aziz has said that the Yang di-Pertuan Agong is obliged to accept the advice of the Pardons Board. He argues that since the Yang di-Pertuan Agong is bound by the advice of the Pardons Board, the Board is, therefore, subject to the supervisory jurisdiction of the courts. He relied on *Maru Ram* v. *Union of India*[14]; *Tonkin* v. *Brand*[15]; *FAI Insurance Ltd.* v. *Winneke*[16]; *Teh Cheng Poh* v. *Public Prosecutor*[17] and *OSK* v. *Tengku Noone.*[18] I agree with the submission to the extent that as the Board is not the King and since its function is only advisory the prerogative is not exercised by the Board.

Mr. Cumaraswamy's appeal was directed at the Pardons Board, not at the Ruler which in the instant case is the Yang di-Pertuan Agong. Therefore there can be no question of the statement having a tendency to bring into hatred or contempt or to excite disaffection against the Yang di-Pertuan Agong.

I find Mr. Cumaraswamy Not Guilty. I acquit and discharge him.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

MOHAMED ABDULLAH TPE ABDUL MAJEED v. HABIB MOHAMED

[O.C.J. (Peh Swee Chin J.) January 7, 1985]

[Seremban – Originating Summons No. 31 of 1983]

Arbitration – Leave sought to enforce arbitration award – Validity of award of arbitrator can still be questioned at stage of application to enforce award – Point of illegality raised before Court – Arbitration Act 1952, s.27.

By a written agreement of May 21, 1976 the parties to the suit became partners of a restaurant. The agreement allowed each of the parties to have exclusive management and control of the said restaurant in alternate years and be entitled to keep for himself exclusively the profits and be liable for any loss of the said restaurant while under his exclusive control and management. In 1979 for some reason the defendant refused to hand over the business of the restaurant. Pursuant to an arbitration clause in the written agreement the court appointed an arbitrator who after a very long hearing delivered his award aforesaid, vindicating the rights of the plaintiff under the said agreement. The plaintiff sought the leave of the court to enforce the award. Leave was granted and against such leave the defendant appealed on the ground that the partnership agreement between the parties was unenforceable as it was tainted with illegality. This was due to the fact that the partnership business was on land held under a temporary occupation licence (T.O.L.) and carried on under the stall licence and both these licences were personal and non-transferable.

The plaintiff submitted that the point of illegality was not raised before the learned arbitrator or the High Court (when the said motion to set aside the award was heard and dismissed).

Held: (1) the validity of an award of an arbitrator can still be questioned at the stage of an application to enforce the award;

(2) the point of illegality affecting the validity of an award is a recognised ground for contesting the application for leave to enforce such an award. Even if it were not pleaded before the arbitrator or the High Court it would be the duty of the court to take a point of illegality even if the parties before it may not take it when this point clearly arises on the evidence;

(3) it is now settled that there is a clear distinction between transfer of rights under a T.O.L. and permission for the use of such rights under the T.O.L. The substance of the partnership agreement did not amount to a transfer of such rights under such T.O.L. or the stall licence but would merely amount to permission for the use of such rights under both licences. Therefore leave should be granted to the plaintiff to enforce the award.

[Editorial Note: The defendant has appealed to the Federal Court in F.C.C.A. No. 316 of 1984.]

Cases referred to:

(1) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.
(2) *Murugesan* v. *Krishnasamy* (1957) 3 M.C. 93.
(3) *Union Nationale Des Co-operatives Agricoles De Cereales* v. *Robert Catterall & Co. Ltd.* [1959] 1 All E.R. 721, C.A.
(4) *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.* [1979] 2 M.L.J. 229.
(5) *Govindaraju* v. *Krishnan* [1962] M.L.J. 334.

ORIGINATING SUMMONS.

D.A. Devadason for the plaintiff.
Thara Singh Sidhu for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J. : In this originating summons, the plaintiff sought leave of this Court to enforce an award of an arbitrator *viz.* Mr. Humfrey Ball, delivered by him on March 17, 1980 in the same manner as a judgment or order to the same effect.

Leave was granted and against such leave the defendant has now appealed.

It would be desirable to set out briefly the events leading to this application for such leave. Both the parties herein became partners of a restaurant known as Barkath Restaurant by a written agreement dated May 21, 1976 allowing each of the parties herein to have exclusive management and control of the said restaurant in alternate years and be entitled to keep for himself exclusively the profits and be liable for any loss of the said restaurant while under his exclusive control and management.

For some reason which need not be repeated here, the defendant refused to hand over in 1979, the said business of the restaurant. Pursuant to an arbitration clause in the written agreement and ultimately, the Court appointed the said arbitrator who after a very long hearing, delivered his award aforesaid, vindicating the rights of the plaintiff under the said agreement.

The defendant, not being satisfied with the award, applied again to this Court by a notice of motion to set it aside on various grounds. The motion was heard and dismissed on September 9, 1983 and an appeal to the Federal Court was filed and subsequently the appeal was not proceeded with for reasons best known to the defendant.

An award of an arbitrator can also be enforced by an action as of right, the cause of action being breach of the condition providing for the arbitration which ahs already taken place. It is normally the practice to proceed under section 27 of the Arbitration Act, 1952 (which the plaintiff has done), for leave to enforce it.

Before me, learned counsel for the defendant submitted that the partnership agreement between the parties hereto was unenforceable for having been tainted with illegality. The partnership business was on land held under a temporary occupation licence (T.O.L.) issued by the Land Office, Tampin and carried on under a stall licence issued by the local authorities, and both these licences were "personal" and non-transferable. He cited, *inter alia, Hee Cheng* v. *Krishnan*[1] and *Murugesan* v. *Krishnasamy*[2] and other similar cases.

Learned counsel for the plaintiff in answer submitted as follows. The award was final under section 17 of the Arbitration Act, 1952. The appeal from the dismissal of the above-mentioned motion was withdrawn in the Federal Court. This point of illegality was not raised before the learned arbitrator or the High Court (when the said motion to set aside the award was heard and dismissed).

In my view, the validity of an award of an arbitrator can still be questioned at the stage of an application to enforce the award. In *Union Nationale Des Co-operatives Agricoles De Cereales* v. *Robert Catterall & Co. Ltd.*,[3] the Court refused leave to enforce the award there but left it to the parties to proceed by action, instead of making the summary order granting leave to enforce the award, on the ground that the Court there entertained doubt about the illegality of the transaction where the palm nuts seller had not obtained a licence said to be necessary for selling such palm nuts. This point of illegality affecting the validity of an award is thus a recognised ground for contesting the application for leave to enforce such an award.

If it was an acceptable ground for resisting an application for leave to enforce an award, would this position be affected by the fact that it was not pleaded before the arbitrator or the High Court hearing the motion to set aside the same award? *Hee Cheng's* case itself provides very clearly also the answer. Thomson, J. (as he then was), held to the effect that it would be the duty of the court to take a point of illegality even if the parties before it may not take it when this point clearly arises on the evidence. Learned counsel for the plaintiff's objection to this point being raised at this stage was therefore unacceptable.

The T.O.L. in the instant case contained an express provision that it was not transferable and though the stall licence did not *ex facie* contain a similar express provision, it could be presumed to be so, as this appeared to be a common ground of both counsel.

It is now settled that there is a clear distinction between transfer of rights under a T.O.L. and the permission for the use of such rights under the T.O.L. as explained by Chang Min Tat, F.J. in *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.*[4] upholding once more, the judgment of Ismail Khan, J. (as he then was) in *Govindaraju* v. *Krishnan.*[5] The observation applies equally, if not more, to a stall licence involved in this case, both being personal to holders and non-transferable.

The substance of the partnership agreement did not, in my view, amount to a transfer of such rights under such T.O.L. or the stall licence but would merely amount to permission for use of such rights under both licences.

For these reasons, I could not accept the submission of learned counsel for the defendant on this point of illegality.

I therefore made an order granting such leave to the plaintiff with costs.

Appeal dismissed.

Solicitors: *D.A. Devadason; Thara Singh Sidhu.*